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No. 129 Orginal

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION OF THE AUDUBON NATURALIST SOCIETY FOR REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION

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STATEMENT OF THE CASE

The Audubon Naturalist Society ("ANS") respectfully asks that this Court overrule Special Master Lancaster's finding of subject matter jurisdiction and direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction in this case. The Special Master incorrectly has inferred from this Court's decision to grant the Commonwealth leave to file a Bill of Complaint that this Court has "implicitly" found that subject matter jurisdiction exists. The Special Master has compounded that error by misinterpreting this Court's Article III jurisprudence in two other respects. First, the Special Master erroneously concluded that the Commonwealth can assert claims for declaratory relief under the Declaratory Judgment Act without having suffered any actual or imminent injury. Second, the Special Master mistakenly determined that the existence of jurisdiction over any one claim in the Complaint eliminated any need to determine whether subject matter jurisdiction exists independently for the remaining claims. Had the Special Master applied the correct standard for subject matter jurisdiction, it would be clear that the Commonwealth's claims must be dismissed because they are not ripe and the Commonwealth lacks standing to assert them.[1]

The Special Master's ruling that subject matter jurisdiction exists arose under unusual circumstances. On October 31, 2000, ANS sought leave from the Special Master to participate as an *amicus curiae* and, in doing so, set forth its

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[1] The Special Master evidently did not file his opinions concerning subject matter jurisdiction as a report recommending a course of action to this Court because he believes that the Court already has decided the jurisdictional issues. Because there is no report for ANS or the parties to object to by filing exceptions, ANS has filed this motion asking that the Court review the Special Master's finding of jurisdiction.

contentions that this Court lacks subject matter jurisdiction over the dispute.[2] ANS also noted that, regardless of whether it is allowed to participate as an *amicus curiae*, the Court has an independent duty to determine its own jurisdiction and that the Special Master should consider the threshold issue of jurisdiction before reaching the merits. In denying the motions of ANS and others to participate as *amicus curiae*, the Special Master expanded that ruling to conclude that the jurisdictional issues were not properly before him because ANS lacked standing to assert jurisdictional claims and by concluding that this Court had "implicitly rejected" challenges to the Court's jurisdiction in granting the Commonwealth of Virginia leave to file a Bill of Complaint. (*See* Special Master's Memorandum of Decision No. 1, *Virginia v. Maryland*, No. 129 (U.S. Dec. 11, 2000) ("First Decision") (App. B at 36a).)

In response to that decision, ANS sought reconsideration of the Special Master's conclusion that the issue of jurisdiction was not before him. (Motion of the Audubon Naturalist Society for Reconsideration of Dismissal for Lack of Subject Matter Jurisdiction, *Virginia v. Maryland*, No. 129 (filed Dec. 13, 2000) (App. C).) ANS reiterated that the Court has an independent obligation to consider its jurisdiction whenever and however it is appraised that jurisdictional questions exist. ANS also explained that in granting the Commonwealth leave to file a Bill of Complaint over jurisdictional objections, the Court did not appear to have decided the jurisdictional issues but to have followed what has been described as the Court's

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[2] On October 31, 2000, ANS filed a consolidated Motion of the Audubon Naturalist Society for Leave to Participate as an Amicus Curiae in Proceedings Before the Special Master and Motion of the Audubon Naturalist Society for Leave to File A Motion to Dismiss for Lack of Subject Matter Jurisdiction. ANS included a copy of the Motion of the Audubon Naturalist Society to Dismiss for a Lack of Subject Matter Jurisdiction in its submission to the Special Master. (App. A.)

"normal practice of permitting the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting) (addressing circumstance in which the defendant objected to jurisdiction in opposing leave to file the Bill of Complaint and filed a motion to dismiss on jurisdictional issues prior to the appointment of a Special Master). ANS further explained that, given the constraints on the Court's resources and the absence of a full briefing of the jurisdictional issues by the parties, it appears doubtful that this Court decided the jurisdictional issues *sub silencio*. *Cf. Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits.").

Upon reconsideration, the Special Master reiterated his conclusion that the jurisdictional issues "implicitly" were decided by this Court. (Special Master's Memorandum of Decision No. 2, *Virginia v. Maryland*, No. 129 (U.S. Dec. 28, 2000) ("Second Decision") (App. D at 48a).) Nevertheless, the Special Master also addressed the merits of ANS' jurisdictional contentions. In addressing those issues, the Special Master concluded that jurisdiction exists over the Commonwealth's claims for declaratory relief because the Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides jurisdiction over any dispute concerning a pure question of law, regardless of whether that dispute has caused the plaintiff any actual or imminent injury. (App. D at 47a-48a.) This was incorrect. The Special Master then compounded this error by concluding that the existence of jurisdiction over the claims for declaratory relief eliminated any need to determine whether the remaining claims would independently satisfy Article III requirements. (App. D at 46a.)

Assuming that this Court was simply following its "normal practice" of referring both jurisdictional questions and questions as to the merits to the Special Master to decide in the first instance, the Special Master's decision concerning jurisdiction significantly undermines the purpose of his appointment. This Court repeatedly has emphasized that federal courts are obligated to consider jurisdictional questions before reaching the merits. *See, e.g., Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 89-101 (1998). By not addressing the jurisdictional issues under the appropriate standards at the outset of the case, the Special Master will direct the parties into proceedings that may take years to resolve. After the significant burden of litigating the Compact of 1785 and other relevant facts that have materialized in the intervening 215 years, the proceedings before the Special Master will—in ANS' opinion—be found irrelevant by this Court because the Commonwealth's claims are not ripe and the Commonwealth lacks standing to assert them. Accordingly, ANS urges this Court to overrule the Special Master's finding as to jurisdiction and direct the Special Master to address whether the Court has subject matter jurisdiction under the proper standard.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THAT IT HAS NOT DECIDED ANY QUESTION OF JURISDICTION IN THIS CASE THROUGH THE GRANT OF LEAVE TO FILE A BILL OF COMPLAINT.

No one contests the fact that this Court has not explicitly ruled on subject matter jurisdiction, but the Special Master and ANS disagree as to whether a ruling on subject matter jurisdiction can be inferred from this Court's order granting the Commonwealth leave to file its Bill of Complaint, despite jurisdictional objections. By granting Virginia leave to file the Bill of Complaint over jurisdictional objections, this

Court appears to have followed its "normal practice of permitting the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. at 463 (Scalia, J., dissenting). Indeed, it would be peculiar for the Court to have used its limited resources to reach a decision on this Court's subject matter jurisdiction without a full briefing of the issue by the parties and at the preliminary stage of allowing a Bill of Complaint to be filed. *Cf. Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. at 527 (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits."). Nevertheless, the Special Master has inferred from this Court's order granting the Commonwealth leave to file its Bill of Complaint that this Court "implicitly rejected" jurisdictional arguments that previously had been made. (App. B at 36a.) As a result, this Court's involvement is necessary to clarify whether it intended to transfer all issues in this case—both as to the merits and to any jurisdictional challenges—to the Special Master for full consideration.

II. THE SPECIAL MASTER ERRED IN CONCLUDING THAT NO ACTUAL OR IMMINENT INJURY IS REQUIRED BEFORE SEEKING DECLARATORY RELIEF.

The Special Master's Second Decision mistakenly concludes that the relief sought under the Declaratory Judgment Act, 28 U.S.C. §2201(a), is ripe merely because the pleadings demonstrate that the parties disagree on the purely legal questions concerning the meaning of the Compact. (App. D at 47a-48a.) The existence of a disagreement on a legal question, however, is not sufficient to establish Article III jurisdiction. This Court explicitly has held that "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. . . . '[C]oncrete

legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) (internal citations omitted); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (explaining that congressional legislation would violate Article III if it attempted to confer standing on persons who had not actually been injured); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577-78 (1992) (holding that Congress cannot legislate around Article III's requirements).

In elaborating upon the case or controversy requirement, this Court has explained that "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (addressing claim for declaratory relief). Thus, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citations omitted) (addressing claim for declaratory relief).

A similar inquiry is required under the standing doctrine. "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000).

While the Commonwealth has established that it has a purely legal disagreement with Maryland over the meaning of the Compact, the Commonwealth has not established that it

has been injured or faces imminent injury as a result of this dispute. Nor has the Commonwealth shown that any injury that it could be suffering is remediable by the declaratory relief that it seeks from this Court.

The heart of the jurisdictional inquiry is whether the Commonwealth has suffered any injury as a result of this abstract legal disagreement with Maryland. The Commonwealth's claim for declaratory relief alleges that, although the Potomac River below the low water mark on Virginia's side of the river lies solely within the State of Maryland, Article VII of the Compact of 1785 and related enactments provide Virginia riparian landowners the absolute right to construct projects in the Potomac River free from Maryland's exercise of its police power. While it is true that Maryland rejects the Commonwealth's claim that the Compact affords Virginia citizens the absolute right to build on the bed of the Potomac River within Maryland—free from any regulatory oversight by Maryland—the Commonwealth has not identified a single Virginian who has been denied such a right in the 215 years that the Compact has been in force. Nor can the Commonwealth show that such an injury is imminent.

The only Virginia entity that the Commonwealth has identified that may someday be affected by Maryland's construction of the Compact is the Fairfax County Water Authority (the "Authority"). The Authority has requested a waterway construction permit from Maryland's Department of the Environment ("MDE") and an appeal of that agency's decision to issue the permit is now before a Maryland state court. The State of Maryland has not made a final decision as to whether the permit should be granted, but thus far the Authority has persuaded an Administrative Law Judge and the Final Decisionmaker from MDE that the permit should issue as a matter of state law. In the event that MDE's decision to issue the permit under state law is affirmed by the Maryland courts, the Authority will receive the permit it

seeks without any need for this Court or any other court to consider the Compact issues. (*See* App. A at 13a-14a.)

In addition, the Commonwealth has made no showing that Maryland's construction of the Compact has prevented the Authority's proposed project or that declaratory relief from this Court could allow the project to go forward. The Authority's project cannot go forward because the Authority lacks the necessary dredge and fill permit from the United States Army Corps of Engineers. Consequently, the denial of a permit by Maryland does not deprive the Authority of anything to which it would otherwise be entitled. Not only does this fact demonstrate that the claim is not ripe, but the fact that declaratory relief under the Compact would not overcome the obstacle of a Corps permit demonstrates that the redressibility requirement for standing is not satisfied either. (*See* App. A at 14a-17a (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998); *Anderson v. Green*, 513 U.S. 557 (1995); *New Jersey v. New York*, 283 U.S. 336 (1931); *New York v. Illinois*, 274 U.S. 488 (1927) and *New Hanover Township v. United States Army Corps of Eng'rs*, 992 F.2d 470 (3d Cir. 1993).)

Consequently, it is not only clear that the Special Master erred in applying the wrong test in determining standing and ripeness requirements for seeking declaratory relief, it also is clear that the Commonwealth's claims for declaratory relief fail the requirement that there be an actual or imminent injury.

III. THE SPECIAL MASTER ERRED BY NOT ANALYZING THE COURT'S JURISDICTION TO DECIDE EACH CLAIM SEPARATELY.

The Second Decision also misconstrues ANS' jurisdictional challenges as limited to only some claims made by the Commonwealth, concluding that there is a justiciable case or controversy for Article III purposes so long as there is

jurisdiction to hear any one of the Commonwealth's claims. (App. D at 46a.) While it is true that the existence of subject matter jurisdiction over any one claim is sufficient to present an Article III case or controversy with respect to that claim, such a finding does not eliminate the need for the Court to consider its jurisdiction to decide the remaining claims.

Federal courts must have subject matter jurisdiction over each claim in a case before them. *See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). Even if the Special Master were to conclude that a justiciable case exists with regard to one claim, those claims that are not ripe or that the Commonwealth lacks standing to assert must be struck from the Bill of Complaint. *See, e.g., New Jersey v. New York*, 283 U.S. at 341 (rejecting a claim in a Bill of Complaint on ripeness grounds); *New York v. Illinois*, 274 U.S. at 89 (upholding Special Master's decision to strike a claim from a Bill of Complaint on ripeness grounds). Moreover, courts must address these threshold jurisdictional questions before addressing the merits. *Steel Co.*, 523 U.S. at 88-103 (holding that federal courts must address jurisdiction before addressing the merits).

Among the claims in the Complaint that should be dismissed is the Commonwealth's claim for an injunction prohibiting Maryland from requiring Virginians to obtain water appropriation permits for water withdrawn from the Potomac River. (App. A at 17a-19a.) Neither Virginia nor any other Virginian have been denied the right to appropriate water from the Potomac River by Maryland and the Authority has explicitly disclaimed any intention of seeking an increase in its water appropriation in the near future. Virginia's Attorney General Early has conceded the lack of ripeness for this claim by reportedly saying that "our case is very clear

cut. We just want to improve our water quality. *We don't want to take one extra drop of water.*" *Early Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (emphasis added.). Accordingly, this claim must be struck from the Complaint. *See e.g., New Jersey v. New York*, 283 U.S. at 341; *New York v. Illinois*, 274 U.S. at 89.

IV. THE COMMONWEALTH DOES NOT HAVE STANDING TO ASSERT COMPACT CLAIMS IN THIS CASE.

The Special Master's Second Decision provides extensive citations to Supreme Court cases where states have sued one another to resolve questions arising under a compact. (App. D at 48a.) The Special Master's reliance upon those cases is unclear. Presumably, the Special Master cited those cases in response to ANS' argument that the Commonwealth lacks standing. There is no question, however, that in a proper case, where one state is the real party in interest that has been injured by another state's construction of a compact, the Supreme Court has jurisdiction to decide cases arising between two or more states concerning that compact.

Unlike the compact cases cited by the Second Decision, however, there is a very real question as to whether the Commonwealth has been injured or is the real party in interest. (*See* App. A at 19a-28a.) Article VII of the Compact, which the Commonwealth asks this Court to interpret, does not vest any right in the Commonwealth but instead confers rights upon third parties—Virginia's riparian land owners. Where compacts confer rights upon third parties, those parties have standing to assert those rights independently of their states. Indeed, third parties often have done so under this very Compact. *See, e.g., United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933); *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921); *Evans v. United States*, 31 App. D.C. 544 (1908); *Ex Parte Marsh*, 57

F. 719 (E.D. Va. 1893). Moreover, third party beneficiaries to a compact are not bound by their state's construction of the compact—they can even sue to challenge their own state's construction of the compact. *See, e.g., Kentucky Union Co. v. Kentucky*, 219 U.S. 140 (1911); *Green v. Biddle*, 21 U.S. 1 (1823).

The real party in interest to assert a claim under Article VII of the Compact would be one of the third party beneficiaries who believes that they have been deprived of their rights. The Commonwealth has not shown any direct injury to itself by any action taken by Maryland. If the Authority or any other Virginian believes that their rights under Article VII of the Compact have been violated, they would be the real party in interest to file suit. Indeed, the Authority has raised claims under the Compact in the litigation now pending in Maryland. Under these circumstances, this Court routinely has rejected attempts by a state to manufacture an original action by stepping into the litigating shoes of its citizens. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 n. 12 (1972); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938); *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911).

CONCLUSION

For the reasons set forth above, ANS requests that this Court clarify its prior order, overrule the Special Master's finding of jurisdiction, and direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims.

Respectfully submitted,

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